



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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Application of Paul Van Henkelum, et al., for a  
Permit to Remove Material from the Bed of Lake  
Beulah, Town of East Troy, Walworth County,  
Wisconsin

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Case No. 3-SE-98-501

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

Mr. Paul Van Henkelum, W1797 Lake Road, Mukwonago, Wisconsin, 53149, filed an application with the Department of Natural Resources for a permit to remove materials from the bed of Lake Beulah. The proposed project is located in the NE ¼ of the NE ¼ of Section 8, Township 4 North, Range 18 East, Town of East Troy, Walworth County, Wisconsin.

On April 2, 1999, the Department of Natural Resources denied the application and determined that the proposed project would be detrimental to the public interest in Lake Beulah.

On April 22, 1999, the Department received a request for a contested case hearing pursuant to Wis. Stat. § 227.42, from Mr. Van Henkelum. On June 20, 2000, the Division of Hearings and Appeals received a Request for Hearing from the Department.

Pursuant to due notice hearing was held at Elkhorn, Wisconsin on March 20, 2001, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with Wis. Stat. § 227.47 and 227.53 (1)(9c), the PARTIES to this proceeding are certified as follows:

Paul Van Henkelum  
W1797 Lake Road  
Mukwonago, WI 53149

Wisconsin Department of Natural Resources, by

Attorney Michael Cain  
P. O. Box 7921  
Madison, WI 53707-7921

Lake Beulah Management District, by

Glen Kreinbrink  
N9329 Beulah Park Road  
East Troy, WI 53120

Lake Beulah Protective and Improvement Association, by

Ruth Rappold  
N9395 Beulah Park Road  
East Troy, WI 53120

Stephen J. Hjort  
110 West Linden Drive  
Jefferson, WI 53549

Dorothy G. Kauffung  
W1789 Lake Road  
Mukwonago, WI 53149

Robert A. and Karen L. Friemoth  
N7173 Bowers Road  
Elkhorn, WI 53121

James and Florence Brennan  
W1785 Lake Road  
Mukwonago, WI 53149

Bob Dobroth  
N9274 Windy Way  
Mukwonago, WI 53149

Doug and Kathy Nalbert  
13640 West Linfield Court  
New Berlin, WI 53151

Todd D. Hansen  
W1819 Lake Road  
Mukwonago, WI 53149

## FINDINGS OF FACT

1. Mr. Paul Van Henkelum, W1797 Lake Road, Mukwonago, Wisconsin, 53149 filed an application on behalf of himself and four co-applicants with the Department of Natural Resources for a permit to remove materials from the bed of Lake Beulah. The proposed project

is located NE ¼ of the NE ¼ of Section 8, Township 4 North, Range 18 East, Town of East Troy, Walworth County, Wisconsin. The Department and applicant have fulfilled all procedural requirements of Wis. Stat. § 30.20.

2. The applicant owns real property located at the address set forth above. The co-applicant neighboring riparians are as follows:

Doug & Kathy Nalbert – W1793 Lake Road, Mukwonago, WI 53049  
Dorothy Kauffung – W1789 Lake Road, Mukwonago, WI 53049  
Todd Hansen – W1817 Lake Road, Mukwonago, WI 53049  
Melvin Bechina – 822 Windy Way, Mukwonago, WI 53049

3. The above-described property abuts Lake Beulah which is navigable in fact at the project site. Mr. Van Henkelum testified that the total area of Lake Beulah is 947 acres. However, the DNR Lakes Book states that Lake Beulah has a surface area of 834 acres. The water level on the lake was raised significantly by dam, and the lakebed is owned by a neighboring riparian. (Masterson)

4. The applicant proposes to dredge an area around the piers proximate to his property and the property of four contiguous neighbors. Further, a channel (southwest of these piers) previously dredged in 1989 would be re-dredged. (See: Ex. 3) The proposed dredging activities would be completed using a dragline. The sediments would be staged on land and loaded onto trucks and be hauled to the disposal area. Sediment fencing would be placed across the mouth of the bay to prevent suspended sediment migration to the main lake. Silt fence would be placed on land to prevent sediment from migrating back into the lake from land-based activities. A total of 27,773 square feet would be dredged.

5. The purpose of the project, as described in the application, is to provide the five riparian owners with improved boat access to their piers. The five properties are located in a bay which is subject to considerable sediment deposition. Water depth in the area around the existing piers is generally between 2 to 3 feet over several feet of soft sediment. (Van Henkelum, Wakeman) There is little wave action in the largely protected bay area. There is a large stand of lily pads in front of the proposed project area to the south. The proposed dredging area does not directly include the lily pad area. Further, the co-applicants placed sand and gravel and removed existing boulders in 1996. Some of the sand has migrated into the lake and contributed to the problem of sedimentation in the bay. (Van Henkelum, Ex. 10) Mr. Van Henkelum, an engineer, also testified that he believed that DNR authorization of an artificial sand bar area contributed to a loss of natural flushing and related sedimentation in the bay. However, the record was by no means clear that the sand bar was artificially created. Ms. Poast testified that the sand bar has been in existence for many years. The sand bar is clearly visible in a 1942 photo she presented. (Ex. 29) Whether the sand bar is artificial or natural, there is no question that it contributes to sediment deposition in the bay area. A prior dredging permit was issued by the DNR to Patrick Nelson, who developed farm land around the lake into sub-divided lots, on July 24, 1989. That permit restricted dredging to 800 cubic yards and required that existing contours of the bed and bank not be altered. (Ex. 6) The applicants' revised plan is similar to the dredging plan approved by the DNR in 1989.

6. Existing lake depths are adequate to allow for navigation out of the bay and access to the main area of Lake Beulah. (Masterson) Mr. Van Henkelum testified that it is possible to gain lake access if he tilts up the motor of his 22-foot deck boat. However, this frequently involves contact with vegetation, logs, tree stumps, and concrete blocks. There is no reason that the concrete blocks, logs, tree stumps and other debris could not be removed in the channel area. (Masterson) The two to three foot depths at the end of existing piers is adequate for most boats making use of the channel. Further, use of an electric trolling motor would provide better control of many boats during times when navigation becomes difficult. A trolling motor would not work well with the Nalbert closed-hull 21-foot ski boat. (Nalbert) The proposed dredging is more than is necessary to allow access to the main body of Lake Beulah. Some limited dredging directly in front of the existing piers, especially the Nalbert property, would provide an adequate path to lake access.

7. The project site has largely a sand and gravel substrate, which is covered by up to “several feet” of organic silt and muck. A diverse stand of native aquatic vegetation include, elodea, chara, yellow and white pond lilies, wild celery, sago and flat-stemmed pondweed, among numerous others. (Ex. 19) The diversity of aquatic plants at the site is unusually rich. (Wakemen; Id.) Also present at the site is Eurasian Water Milfoil (EWM), an invasive non-native nuisance plant.

8. Substantial efforts at controlling EWM have been undertaken by the Lake Management District (the Lake District) and the DNR. (Kreinbrink) Mr. Glen Kreinbrink described the efforts of the Lake Beulah Management District to control EWM, including development of a formal aquatic plant management plan. (Ex. 28) The plan recommended prohibiting dredging or other activities that disrupted the lake bottom because of the risk of domination of EWM in disturbed areas. (Id., Ex. 27) Areas of Lake Beulah subject to dredging have been the areas most susceptible to EWM domination of other native plant species. (Wakeman, Masterson, Ex. 25)

The co-applicants agreed that dredged areas are susceptible to EWM domination on Lake Beulah. (Hjort) Mr. Steve Hjort proposed that the dredging be followed by efforts to re-establish native vegetation in disturbed areas. However, Mr. Hjort, a biologist, admitted that the likelihood of successfully establishing native vegetation was “less than 50/50.” EWM, which reproduces asexually, is an unusually aggressive plant which often dominates areas with a disturbed lake bottom. The co-applicants have not demonstrated that the proposed dredging can be accomplished in a manner which would be consistent with the public interest in maintaining native aquatic plant communities and controlling EWM.

9. As Mr. Van Henkelum testified, the area proposed to be dredged is relatively small compared to the lake as a whole. However, the near-shore littoral area is the most fertile, “bread basket” area of a lake. (Wakeman) The small bay area constitutes a remarkably diverse aquatic plant community. (Id.) Further, there has been a proliferation of water regulation and zoning permit applications on Beulah Lake in recent years. (Ex. 50) As in the instant case, dredged areas must often be re-dredged to maintain desired water depths. There would be a

detrimental cumulative impact from numerous, repeated small dredging projects disturbing the littoral zone. (Wakeman)

10. The aquatic vegetation in this bay provides spawning habitat for yellow perch and northern pike. The vegetation also provides nursery habitat for northern pike, yellow perch, largemouth bass, bluegill, crappie, pumpkinseed, and minnow species. Additionally, the vegetation provides habitat for aquatic invertebrates which in turn act as a food source for all the fish listed above. (Ex. 15) Douglas Welch, DNR Fish Biologist, provided undisputed expert testimony that the proposed dredging would eliminate aquatic vegetation and associated spawning and nursery habitat for large mouth bass, bluegill, and northern pike. The proposed project is not consistent with public interest in maintaining fish habitat on Lake Beulah.

11. Because the area of the lakebed in the project area is not public lakebed, water quality standards for wetlands apply. (NR 103) The proposed project is not consistent with the public interest in maintaining the wetland functional values of maintaining fish and wildlife habitat, natural scenic beauty and water quality. (Masterson) There are alternatives to dredging all of the proposed area that would allow for continued lake access. These include dredging a small area, removal of hard objects and the use of trolling motors. (Masterson)

## DISCUSSION

The proposed dredging site is a beautiful bay on Lake Beulah that supports an unusually rich and diverse stand of aquatic vegetation. DNR Surface Water Protection Expert Robert Wakeman testified that a plant survey indicated 15 different plant species in the bay area alone, more than exists in many lakes as a whole. The vegetation, in turn, provides excellent fish habitat in the area adjacent to the piers. The applicants have not demonstrated that the proposed dredging could be accomplished without degrading the aquatic vegetation, fish habitat and water quality.

There is no question that the bay area is subject to the settling of organic materials. However, all of the riparians have maintained the ability to get to the main body of the lake. This is all that the law requires. Many of the problems they have experienced are related to solid objects—three stumps, concrete blocks and other debris—which could be removed. Further, there is no absolute right to keep a large boat at every location on a lake.

The public trust doctrine reflects an effort by the law to balance the rights of riparians with rights of the public in waters held in public trust. The right of reasonable use of water was one of the rights assured owners adjacent to lakes and streams, others including the right to accretions, relictions, pierages and wharfages. What constitutes a reasonable use, under the common-law test, is a factual determination, varying from case to case, and subject to a trust doctrine concept that sees all natural resources in this state as impressed with a trust for usage and conservation as a state resource. *State ex. Rel. Chain O'Lakes Assoc. v. Moses*, 53 Wis. 2d 579, 582, 193 N.W.2d 709 (1972).

The Lake Beulah Management District has taken an active role in conserving the lake as a public resource, including efforts to control Eurasian Water Milfoil. Decades of experience have demonstrated a direct association between EWM proliferation and dredging. Dredging disturbs existing native vegetation and eliminates seed sources for desirable plants. It increases turbidity and decreases the light needed for rooted vegetation to take hold. All of this has led the Lake Management District to recommend no further dredging on Lake Beulah.

The record at hearing does not support a total ban on dredging, but the applicants have not demonstrated that the proposed dredging would be consistent with the public interest. Accordingly, the permit application must be denied. It is hoped that the parties will work together to approve a plan to remove hard objects from the bay, and to dredge a smaller area immediately proximate to existing piers. Any such dredging should not occur during the fish spawning season between February 15 and June 15.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and to issue necessary orders in cases involving the removal of materials from the beds of waterways pursuant to Wis. Stat. §§ 227.43(1)(b) and 30.20.

2. The applicant has the burden of proof in an application for a permit under Wis. Stat. Chapter 30, *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 412 N.W.2d (Wis. Ct. App. 1987)

3. No person shall remove any material from the bed of any lake or stream not mentioned in par. (a) without first obtaining a permit from the department under sub. (2)(c). A permit to remove any material may be issued if the issuance of the permit would be consistent with the public interest in the water involved. Wis. Stat. § 30.20(2)(c) The applicants have not carried their burden of proving that the project is consistent with the public interest in maintaining native aquatic vegetation, fish habitat and water quality.

4. The DNR must consider the "cumulative impacts" of many small projects on the public waters of the state. *Sterlingworth Condominium Ass'n v. DNR*, 205 Wis. 2d 710, 721-22, 556 N.W.2d 791 (Wis. Ct. App. 1996) Citing *Hixon v. PSC*, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577, 589 (1966) There would be detrimental cumulative impacts upon the public waters of the state if the project were approved as proposed.

5. The Department has complied with the procedural requirements of Wis. Stat. § 1.11 and Wis. Admin. Code NR 150 requiring assessment of environmental impact.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the permit application be DENIED.

Dated at Madison, Wisconsin on April 20, 2001.

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DIVISION OF HEARINGS AND APPEALS  
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By \_\_\_\_\_  
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

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NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48, and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.